

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
SALVATORE A. MOSCHETTO	:	DETERMINATION
OFFICER OF CITY CHRYSLER & PLYMOUTH, INC.	:	DTA NO. 809873
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1987	:	
through November 30, 1989.	:	

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Petitioner, Salvatore A. Moschetto, officer of City Chrysler & Plymouth, Inc., c/o Raymond M. Pezzo, Bardavon Building, 35 Market Street, Poughkeepsie, New York 12601-3285, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1987 through November 30, 1989.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on September 4, 1992 with all briefs to be submitted by December 16, 1992.

In a letter dated October 14, 1992, petitioner's request for an extension of time to file his brief was granted and the time to file the last brief was extended to December 16, 1992 which began the six-month period to issue this determination. Petitioner filed a brief on November 2, 1992 and a letter on December 10, 1992. The Division of Taxation did not file a brief. Petitioner appeared by Raymond M. Pezzo, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect and pay over sales and use taxes on behalf of City Chrysler & Plymouth, Inc. within the meaning and intent of Tax Law §§ 1131(1)

and 1133(a).

FINDINGS OF FACT

During the period in issue, City Chrysler & Plymouth, Inc. ("City Chrysler") was a firm which sold new and used automobiles. It also repaired automobiles and sold automobile parts.

The Division of Taxation ("Division") issued a series of notices of determination and demands for payment of sales and use taxes due, dated October 12, 1990, which assessed sales and use taxes against petitioner, Salvatore A. Moschetto. Each of the notices stated that petitioner was liable individually and as officer for the taxes determined to be due from City Chrysler. The notices assessed sales and use taxes as follows:

<u>Period Ending</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
8/31/87	\$ -0-		\$ 2,285.88	\$ -0- \$ 2,285.88
2/29/88	30,290.44		9,232.41	11,090.86 50,613.71
5/31/88	84,927.12		26,327.16	28,525.48 139,779.76
8/31/88	72,837.99		22,579.62	21,383.58 116,801.19
5/31/89	8,944.10		2,968.93	2,002.87 13,915.90
8/31/89	167,955.48		21,834.20	6,681.39 196,471.07
11/30/89	51,729.76		10,348.97	5,862.88 67,941.61
2/28/90	111,970.32		15,115.99	4,122.95 131,209.26

Petitioner entered into the automobile business in 1978. At that time he was hired by Kenneth Devereaux to work in the service and parts department at a firm known as Car Village Buick Opal ("Car Village"). In this position, petitioner was responsible for the service and parts department. Among other things, petitioner was expected to see to it that the obsolete parts in the parts department were returned for credit. He was also expected to make sure that customers were satisfied.

In or about 1982 or 1983, petitioner left Car Village and began working for ADS Recovery, a firm which engaged in repossessions.

After working for ADS Recovery for about a year, Mr. Devereaux offered petitioner a position at City Chrysler. It was contemplated that petitioner would perform the same tasks at City Chrysler as he performed at Car Village. At the time of the job offer, the stockholders of City Chrysler were Kenneth Devereaux and Sheldon Reynolds.

In or about January of 1986, Mr. Devereaux offered petitioner an opportunity to invest in the business. Mr. Devereaux was interested in another person investing in City Chrysler

because he wanted to spend more time at a home he had purchased in Rhode Island. Petitioner was told that, for \$75,000.00, he would acquire one-third of the stock. Further, \$5,000.00 of the \$75,000.00 investment was to be paid immediately.

Petitioner accepted this offer and in July 1986 the sale of the stock was completed. Thereafter, petitioner became an owner of one-third of the stock of City Chrysler. He also acquired the title of secretary- treasurer. After adjusting the equity accounts, Kenneth Devereaux and Sheldon Reynolds each also owned one-third of the corporation's stock.

A couple of years after petitioner became a stockholder, Mr. Devereaux asked Mr. Reynolds and petitioner to invest an additional \$50,000.00 in the business. Since petitioner wished to remain in the business, he invested the money as requested. Thereafter, Mr. Devereaux took \$25,000.00 for himself and invested the remaining \$25,000.00 in the business.

After petitioner acquired his interest in City Chrysler, Mr. Devereaux's participation in the business was sporadic. At times, he would be active in the business five days a week and at other times one day a week. When he was at the business premises, Mr. Devereaux might stay for as little as 15 minutes or as long as eight hours. However, important changes in the business were not made without Mr. Devereaux's involvement.

When petitioner became an investor in the business, he continued to function as the manager of service and parts. In addition, his salary of \$600.00 a week remained the same. Petitioner never received any dividends from City Chrysler.

In July 1987, the sales manager was fired and petitioner was given the former sales manager's office. Further, Mr. Reynolds began teaching petitioner the retail aspects of the used car business. A procedure was devised that when an offer was made for a used car, the salesman would go to petitioner for approval. Petitioner then asked Mr. Reynolds whether the offer should be accepted.

If Mr. Reynolds was busy or unavailable, a salesman would go to Mr. Moschetto to approve the sale. However, Mr. Reynolds had the final say on whether a deal would be

accepted.

Petitioner attended auctions where automobiles were bought and sold. On two occasions, petitioner purchased an automobile by completing checks which had been previously signed by Mr. Reynolds. Petitioner obtained Mr. Reynolds's approval prior to the purchase.

City Chrysler's sales tax returns were prepared by a Jean Crooms from journals which recorded the sales of new and used automobiles. The completed return was then left with Bernice Reynolds, who served as the officer manager. Mrs. Reynolds then prepared the check to accompany the return. Thereafter, the sales and use tax returns were signed by Mr. Reynolds.

Petitioner did not have any office functions at City Chrysler. He neither provided any information on the New York State sales and use tax returns nor signed any of the corporation's sales and use tax returns.

On a daily basis, an individual who worked in the office collected the previous day's cash receipts from the service department. The receipts from the service department were combined with the funds that were delivered by mail and the receipts from the sale of automobiles. After the deposit receipt was prepared, Mr. Reynolds took the money to the bank.

Mr. Reynolds held the title of president. In this position, he was responsible for City Chrysler's financial matters and for the sale of new automobiles. Mr. Reynolds's duties included supervising the salesmen who sold new automobiles and hiring office personnel.

In or about 1987 or 1988, petitioner observed that several individuals had a discussion with Mr. Reynolds at the corporate premises. When he asked Mr. Reynolds who the people were, petitioner was told that they were from the New York State Department of Taxation and Finance. Petitioner was also told that the matter was closed and that petitioner should do his job.

The first time petitioner became aware that the corporation was liable for sales tax was in January 1990. Mr. Reynolds approached petitioner at this time and stated that the next day petitioner would have to work without taking a break for lunch. Mr. Reynolds explained that he

had to go to the New York State Department of Taxation and Finance.

On the day after the trip, Mr. Reynolds told petitioner that City Chrysler owed \$300,000.00 and that the Department of Taxation and Finance wanted City Chrysler to pay \$100,000.00 each week. Further, City Chrysler did not have the money to meet this demand. Mr. Reynolds then explained that he and Mr. Devereaux knew what to do to straighten out this matter. On January 22, 1990, City Chrysler filed a petition in bankruptcy.

City Chrysler maintained a bank account at the Poughkeepsie office of the Marine Midland Bank, N.A. The signature card on this account listed Kenneth Devereaux, Sheldon Reynolds and petitioner and required any two signatures. However, checks were frequently negotiated with one signature. In practice, a majority of the checks were signed by Mr. Reynolds. Petitioner also had check-signing authority on a City Chrysler account which was located at the Bank of New York. Only one signature was required to draw funds on this account.

It was petitioner's practice to sign checks pertaining to the service and parts department. However, petitioner needed Mr. Reynolds's approval to spend more than \$350.00 on merchandise for cars that were not under warranty. City Chrysler's payroll checks were co-signed by Mr. Moschetto and Mr. Reynolds. Generally, petitioner did not sign checks pertaining to the corporation's sales tax liability. However, on one occasion petitioner did sign a check for the payment of sales tax.

To the best of petitioner's knowledge, City Chrysler did not have a separate account for payroll taxes or sales taxes.

When petitioner became a stockholder of City Chrysler, he agreed not to hire or fire employees without Mr. Reynolds's approval. Subsequently, petitioner adhered to this agreement. In practice, petitioner delegated his authority to conduct employment interviews to the service manager.

Mr. Devereaux and Mr. Reynolds referred to petitioner as a "junior partner". This term was intended to make it clear to petitioner that he was unfamiliar with the sales aspect of the

automobile business and was therefore expected to do what he was told. On one occasion, petitioner was told that if he did not do what he was told, his investment would be returned and he could leave the premises.

Generally, petitioner followed Mr. Devereaux's direction on how things should be done because Mr. Devereaux was a successful businessman and petitioner felt that if he did things the same way he would also be successful. Petitioner also abided by what Mr. Devereaux said because of his prior experience of working for Mr. Devereaux at Car Village and at City Chrysler.

Petitioner reviewed the books and records of City Chrysler at the time he invested in the business. Thereafter, he did not ask to review the books and records. When petitioner asked Mr. Reynolds how "things" were, he was told "That's not your worry. That's my worry." In or about July 1988, petitioner was given the combination to the safe where the records were stored. However, Mr. Reynolds stated that unless something happened to him, it was not necessary for petitioner to go into the safe. Mr. Reynolds warned petitioner that if something were missing and the police were called, they did not want to find out that one of the "partners" had been in the safe.

Mr. Reynolds executed a Floor Plan Agreement with Marine Midland Bank, N.A. which was dated September 26, 1985. On the same day, Mr. Reynolds and his wife executed an Unlimited Continuing Guarantee with the same bank. On October 3, 1985, Mr. Devereaux and his wife executed an Unlimited Continuing Guarantee to Marine Midland Bank, N.A. Petitioner signed an Unlimited Continuing Guarantee on February 23, 1987. However, he never signed a Floor Plan Agreement because he was never asked to do so.

At some juncture, the Internal Revenue Service sought to hold petitioner responsible for withholding taxes due from City Chrysler for the period July 1, 1989 through March 31, 1990. Eventually, the Internal Revenue Service concluded that petitioner was not responsible for said taxes.

After City Chrysler ceased operating, the Attorney General of the State of New York

commenced a lawsuit against, among others, petitioner, Mr. Reynolds and City Chrysler for civil fraud on the basis that liens were not paid on cars that were sold. Later, the Attorney General stipulated to a discontinuance of the proceeding.

In March 1990, Marine Midland Bank, N.A. commenced a lawsuit against petitioner for selling automobiles out of trust. At the time of the hearing, this litigation was still in progress.

#### SUMMARY OF PETITIONER'S POSITION

In his brief, petitioner argues that there are many factors to support his position that he is not liable for the sales tax, penalty or interest and that he was not authorized to collect and remit sales tax on behalf of City Chrysler. Petitioner also argues that he has sustained his burden of proof to show that he was not under a duty to act for the corporation and that once the burden of proof shifted, the Division failed to go forward.

Petitioner also submits that signing the unlimited guarantee without signing other documents, such as the floor plan agreement, does not make him liable for City Chrysler's sales tax. Lastly, petitioner argues that the answer of the Division is erroneous and that the summation of the Division's representative was misleading, inflammatory and deceptive.

#### CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

B. The resolution of whether a person is responsible to collect and remit sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Stacy v. State Tax Commn., 82 Misc 2d 181, 183, 368 NYS2d 448). The decision of the Tax Appeals Tribunal in Matter of Autex Corp. (Tax Appeals Tribunal, November 23, 1988) offers a useful summary of the factors which are considered in determining whether a

corporate officer is under a duty to act for a corporation in complying with the requirements of Article 28. These factors include:

"[T]he authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536); the individual's possible shared status as an officer, director or stockholder (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564, 565); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 429). Within closely held corporations, 'an officer's knowledge of the corporate affairs and his benefits received from corporate profits [are] extremely important considerations' (Vogel v. New York State Dept. of Taxation & Fin., supra, at 226, 413 NYS2d 862, 865)" (Matter of Autex Corp., supra).

C. Applying the foregoing factors to the immediate situation leads to the conclusion that petitioner is responsible for the taxes due from City Chrysler. The record shows that petitioner owned one-third of the outstanding stock and received a substantial income from City Chrysler. In addition, petitioner was a member of City Chrysler's board of directors and held the office of secretary-treasurer.

The record shows that petitioner's day-to-day responsibilities included an involvement with the management of the corporation. Among other things, petitioner managed the parts and repair department and exercised influence over who was going to be hired in said department. Petitioner also supervised those employees who sold used automobiles.

With respect to the corporation's financial affairs, the record shows that petitioner was an authorized signatory on the corporation's checking accounts and that this authority was exercised on a regular basis with respect to the purchases involving the repair of automobiles and the signing of payroll checks. Further, although petitioner did not have regular duties with respect to sales taxes, the fact that petitioner drafted a check to satisfy a sales tax obligation shows that petitioner's checking-signing authority extended to the payment of taxes. Lastly, petitioner's assumption of responsibility with respect to City Chrysler's financial affairs is demonstrated by petitioner's signing of an unlimited guarantee. In sum, the facts presented



herein clearly establish petitioner's liability for the taxes in issue (see, Matter of Kropf, Tax Appeals Tribunal, March 21, 1991 [where the taxpayer was found responsible for sales and use taxes on a similar set of facts]).

D. In reaching the foregoing conclusion, it is noted that petitioner's arguments have been considered and rejected. Petitioner's reliance upon Matter of Berkman (State Tax Commission, October 31, 1985) is misplaced as this case does not set forth the relevant criteria in the manner described in petitioner's brief. For example, there is no language in Matter of Berkman (*supra*) which requires a demonstration that the taxpayer served as the only manager, had sole authority to hire and fire employees or prepared, signed and filed tax returns of every nature. Further, if petitioner's understanding of Matter of Berkman (*supra*) were accepted, it would be violative of the principle that more than one person may be under a duty to act for a corporation in complying with the Tax Law (see, Matter of Young, Tax Appeals Tribunal, September 19, 1991).

E. The second and third arguments in petitioner's brief discuss whether there are sufficient factors to find that petitioner was a person required to collect sales tax within the meaning and intent of Tax Law §§ 1131(1) and 1133(a). These factors have already been sufficiently discussed. It is noted that corporate officials such as petitioner will not be absolved of their responsibility by disregarding their duty and relying on others to fulfill their obligations (Matter of Baumvoll, Tax Appeals Tribunal, November 22, 1989).

F. As noted, petitioner argues that signing the Unlimited Continuing Guarantee without signing other documents, such as the floor plan agreement, did not make petitioner liable for City Chrysler sales tax. Petitioner also contends that the Unlimited Continuing Guarantee was assigned without notice to petitioner and therefore the assignment was not effective against him.

Petitioner's fourth argument is rejected because it does not address the central issue in this matter. The question presented is whether petitioner is liable for the taxes due from City Chrysler. Petitioner's signing of the Unlimited Continuing Guarantee is significant inasmuch as

it shows petitioner's acceptance of financial responsibility regarding City Chrysler. The question of whether the Unlimited Continuing Guarantee is contractually binding is outside the scope of this proceeding.

G. Petitioner's remaining arguments concerning the answer of the Division and the alleged inflammatory statement made at the hearing have been considered and do not result in relieving petitioner from liability. Each of the Findings of Fact was based on the record which was created at the hearing.

H. Lastly, it is noted that, contrary to the suggestion in petitioner's brief, there is nothing in the transcript to indicate that the Division conceded the amounts assessed for the quarter ended February 28, 1990.

I. The petition of Salvatore A. Moschetto, officer of City Chrysler and Plymouth, Inc., is denied and the notices of determination and demands for payment of sales and use taxes due, dated October 12, 1990, are sustained together with such interest as may be lawfully due.

DATED: Troy, New York  
June 16, 1993

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE